

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

SANDY J. BATTISTA,  
Plaintiff,

vs.

KATHLEEN M. DENNEHY, Comm'r., et al.,  
Defendant's.

C.A.No.05-11456-DPW.

PLAINTIFF'S REPLY TO OPPOSITION OF DEFENDANTS  
KATHLEEN M. DENNEHY, ROBERT MURPHY, SUSAN MARTIN,  
STEVEN FAIRLY AND GREGORY HUGHES TO PLAINTIFF'S REQUEST  
FOR A PRELIMINARY INJUNCTION

Plaintiff, Sandy J. Battista("Battista"), acting pro-se in the above captioned matter, hereby briefly responds <sup>1/</sup> to the Opposition of Defendants Kathleen M. Dennehy, Robert Murphy, Susan Martin, Steven Fairly and Gregory Hughes(collectively "Defendants"), to her pending Application for a TRO, and/or in the Alternative, for a Preliminary Injunction.

In their Opposition, Defendants attempt to avoid the controlling authority of the Supreme Court case in Estelle vs. Gamble, <sup>2/</sup> by arguing that: (1) Battista's current action is barred under the Doctrine of Res Judicata; (2) the "gravament" of Battista's Complaint amounts to a "dispute over the proper course of treatment," and therefore, cannot prevail on the likelihood of her claims; and

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[1] A Motion Requesting this Court's Leave to file the within REPLY was timely filed with this Court on July 27, 2005.

[2] 429 U.S. 97 (1976).



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App.Ct. 153, 163 (1979)(citations omitted).

In the most recent decision of the Massachusetts Appeals Court, Justice Spina sets for the requirements in Massachusetts for Res Judicata:

The term "res judicata" includes both claim preclusion and issue preclusion. Heacock vs. Heacock, 402 Mass. 211, 23 n.2 (1988). "The doctrine of claim preclusion makes valid, final judgments conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action....The doctrine is a ramification of the policy considerations that underlie the rule against splitting a cause of action, and is 'based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first action.'" Id at 23-24(citation omitted).

The doctrine of issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." Id. at 23 n.2. It requires proof that "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication is identical to the issue in the current adjudication. Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment." Commissioner of the Dept. of Employment and Training vs. Dugan, 428 Mass. 138, 142 (1988)(citation omitted). Issue preclusion can be used only to prevent relitigation of issues actually litigated in the prior action, Fidelity Mgmt. & Research Co. vs. Ostrander, 40 Mass.App.Ct. 195, 199 (1996), and thus we look to the record to see what was actually litigated. See Gleason vs. Hardware Mut. Co., 324 Mass. 695, 699 (1949). As the defendant's in this case are the parties asserting both claim and issue preclusion, they bear the burden of proof on the elements. See Fabrizio vs. U.S. Suzuki Motor Corp., 362 Mass. 873, 873-74 (1974); McSorley vs. Hancock, 11 Mass. App.Ct. 563, 565 (1981).

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1241 (11th Cir, 1988).



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Sarvis vs. Boston Safe and Trust Co., 47 Mass.App.Ct. 86, 98-99 (1999).

Applying the above principles to the record at hand, reveals the weakness of the Defendants argument. Here, it is conceded that the decision in Battista's prior state court action, Battista vs. Commonwealth & others, No.97-03487-A(Suffolk Superior Court)(1998) 6/, resulted in (a) a final judgment on the merits; and (b) was by a court of competent jurisdiction. And in a similar action filed with this court, Battista vs. Murphy, Superintendent, et al., No.02-CV-10137-MEL 7/, on November 4, 2002, this Court (Lasker, J.) entered a MEMORANDUM AND ORDER granting the defendants' motion to dismiss pursuant to the doctrine of res judicata. However, Battista vigorously disputes that her current claims involve (c) the same cause of action; and (d) the same parties or their privies, for the following reasons:

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[6] In 1997, while incarcerated, Battista filed an action pro-se with the Suffolk County Superior Court, alleging that the defendants', various Department of Correction Officials, Administrators, and Health Services Personnel, were being "deliberately indifferent" to her (then) [self-diagnosed] gender disorder by refusing to provide her with female hormones, sex reassignment surgery, as well as the right to wear female clothing. The Court (Burnes, J.) in treating defendants' motion as one for summary judgment, held in relevant part that, "In consideration, the Court has found that it is Battista who has diagnosed herself as a transsexual. She has failed to proffer reliable evidence, such as a medical diagnosis rendered by a physician, confirming her assertion....Thus, the Court seriously doubts whether Battista will be able to put forth any evidence of a 'serious medical need' at trial." Id. at page-11(attached herewith and marked as Attachment-1 for this courts convenience).

[7] Complaint, ¶¶16-18 & Exhibit-2.



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First, unlike the facts in Battista's prior state court action, here, in accordance with this court's recent decision in Kosilek vs. Maloney, <sup>8/</sup> Defendants arranged for Battista to be seen by two independently retained gender experts for the specific purposes of an evaluation and diagnosis as to Battista's proclaimed gender issues, as well as an appropriate treatment plan to address such gender issues. <sup>9/</sup> The examiners, in their report diagnosed Battista as meeting all of the clinical criteria for "Gender Identity Disorder(NOS)," and recommended that she be provided female hormones and individual counseling by either an experienced person or person trained to counsel persons with gender issues, to support the adjustment the hormones will bring. <sup>10/</sup> Subsequently, in accordance with those treatment recommendations, Defendants then arranged for Battista to be seen by an outside specialist in endocrinology for a battery of medical tests and the development of an appropriate medical prescription to address hormonal administration, as well as instructed the Treatment Center's in-house medical physician to fill said prescription. <sup>11/</sup> These facts clearly indicate that Battista's current claims, though at first glance may involve her gender issues, may involve an "operative nucleus

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[8] 221 F.Supp.2d 156 (D.Mass. 2002).

[9] Complaint, ¶34.

[10] Complaint, ¶35.

[11] Complaint, ¶¶36-38.



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of fact" different from the facts in her prior state and federal court actions. Thomas, 880 F.2d at 1240-41. Additionally, pragmatically speaking, the facts involved in Battista's current claims are distinct and unrelated in time, space, origin, and in motivation. Murphy, 877 F.2d at 685. <sup>12/</sup>

Finally, simply because the Department of Correction retains jurisdiction over the states prison, as well as the Treatment Center, does not by itself, enable the Defendants to invoke the claim preclusive effect of judgments in actions to which the DOC's employees were parties in. See generally, 18 Wright, Miller & Cooper, Federal Practice and Procedure, 84460 at 533-36 (19810; see also Roche vs. Roche, 22 Mass.App.Ct. 306, 493 N.E.2d 523, 525 (1986)("Since [defendant] played no role directly or vicariously in the [prior litigation], we are of the opinion that he is not entitled to claim a benefit from the judgment in that case"). Defendants have, moreover, made no conclusive showing that the defendant's in Battista's prior state court action were representing their interest, nor have they shown that as a matter of law, Battista's current claims under G.L. c.123A, are in all instances derivative of the claims raised in her prior state

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[12] The record at issue also indicates that, upon filing her prior state and federal actions, a determination as to Battista's (then) alleged "sexual dangerousness" under G.L.c.123A, had yet to be adjudicated. As such, this court should infer from that basis a separate claim under c.123A. Where "formal barriers" to asserting a claim existed in the first forum it would be "unfair to preclude [the plaintiff] from a second action in which he can present those phases of the claim which he was disabled from presenting in the first." Davidson vs. Capuane, 792 F.2d 275, 278 (2nd Cir.1986)(citing Restatement (Second) of Judgments §26(1)(c) comment c (1982)). See Burges vs. Hopkins, 14 F.3d 787, 790 (2nd Cir. 1994)(the bar does not apply where "the initial forum did not have the power to award the full measure of relief sought in the later action").



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court action. Thus, on the present record, Defendants are unable to claim the benefit of the judgment in Battista's prior state court action. See Hermes Automation Technology vs. Hyundai Elec. Ind., 915 F.2d 739, 751 (1st Cir. 1990)(citing Roche, 493 N.E.2d at 525)). Since claim preclusion is grounded upon considerations of fairness and efficient judicial administration, the doctrine is not applied rigidly where such interests would not be served. Gloucester Marine Railways Corp. vs. Parsi, Inc., 36 Mass.App.Ct. 386, 391-92 (1994). See Restatement (Second) of Judgments §28(2)(b)("a new determination is warranted in order to make account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of laws"). Therefore, the question of what treatment Defendants are constitutionally and statutorily are obligated to provide Battista with, in the context of G.L. c.123A, was not heard or decided in Battista's state court action, nor could it of had been raised. And thus, there has been no judgment on the merits, with regards to Battista's constitutional and statutory claims under G.L. c.123A. Res judicata therefore does not apply.

II. In REPLY to Defendants Contentions That the "Gravamen" of Battista's Complaint Amounts to a Dispute Over the Proper Course of Treatment, And Therefore, Cannot Pre-vail on the Likelihood of Her Claims.

Here, Defendants attempt to categorize Battista's current claims as one amounting to a "dispute over the proper course of treatment," is not only "arbitrary," but is also without "foundation in fact and law." For example, in support of it's argument, Defendants have attached along with the Affidavit of a Lawrence H. Weiner("Weiner Aff."), a Licensed Clinical Social Worker and



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Regional Administrator with the Department of Corrections Health Services Division, <sup>13/</sup> the (1) report of a Dr. Ronald Ebert (Attachment 1 to Weiner Aff.); (2) an Intake Assessment Report conducted by a David Campopiano (Attachment 2 to Weiner Aff.); (3) Psychological Assessment Report of a Dr. J. Tyler Carpenter (Attachment 3 to Weiner Aff.); and (4) Psychological Assessment of Battista's (then) medical records by a Dr. Victoria Russell (Attachment 4 to Weiner Aff.). Which, according to Defendants position, constitutes the legal basis pertaining to "conflicting opinions over the proper course of treatment," with regards to Battista's gender issues. To the contrary, the "opinions" the Defendants rely upon are nothing more than reports from medical professionals who lack any formal training, education, or experience in evaluating or treating persons with gender issues, nor have Defendants provided this court with any evidence to the contrary. Therefore, these "reports" cannot form the legal basis for the Defendants position. See, e.g., Kosilek, 221 F.Supp.2d at 193.

In Kosilek, this Court (Wolf, J.), in ruling in a factually similar situation, held that:

... "Decisions as to whether psychotherapy, hormones, and/or sex reassignment surgery are necessary to treat Kosilek adequately must be based on an 'individualized medical evaluation' of Kosilek rather than as 'a result of a blanket rule.' Those decisions must be made by qualified professionals. Such professionals must exercise sound medical judgment, based upon prudent professional standards particularly the Standards of Care." <sup>14/</sup>

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[13] Here, Battista request that the court take judicial notice of the fact that, Defendants have a history of procuring affidavits from employees of it's Health Services Divisions, then failing to honor those declarations. See, e.g., Complaint, ¶17 & Exhibit-1.



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Id. Moreover, Defendants seem to be "selectively choosing" what documents and information to bring to the court's attention. Though ignore the fact and fail to mention that, in November of 2004 upon receiving the Fenway Clinic's clinical diagnosis and treatment recommendations, concerning Battista's gender issues (Attachment 2), not only was reviewed and approved by the Treatment Center's whole medical and mental health personnel (Attachment 3), but Defendants themselves made arrangements to put those treatment recommendations into effect, by arranging for the development of an appropriate medical prescription to address hormonal therapy, as well as arranging for one of the Treatment Center's mental health clinician's to be trained by the Fenway Clinic to provide Battista with individualized counseling. (Attachment 4). This is a far cry from the Defendants position that Battista's current claims amount to "a dispute over the proper course of treatment." Here, if in fact a "dispute" does exist, it is with the Defendants and this court's prior decision in Kosilek. (See, e.g., Attachment 5). These undisputed facts,<sup>15</sup> clearly constitutes

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[14] Here, it is noted that, for some unknown reason Defendants have interpreted Battista's current claims as one also pertaining to both [surgical castration and sex reassignment surgery]. However, nowhere in Battista's pleadings has she made reference to such. Moreover, Battista has not been evaluated or recommended for such medical procedures. Nevertheless, the [Standards of Care] explain that: "hormone therapy alone may provide sufficient symptomatic relief to obviate the need for cross-living or surgery." Kosilek, 221 F.Supp.2d at 194-95.

[15] It is noted here that, Defendants own pleadings adhere to these facts. See Weiner Aff. at 15 ("On April 12, 2005, Battista was evaluated by an endocrinologist at the Shattuck Hospital who prescribed hormones for Battista. On April 14, 2005, a Treatment Center physician approved the prescription for female hormones")(emphasis in original).



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Battista's position of "an arbitrary interference with treatment once prescribed" by administrative officials. See Estelle, 429 U.S. at 105 (noting that "intentionally interfering with the treatment once prescribed" is a form of unlawful deliberate indifference).

Additionally, relying on this court's decision in Cameron vs. Tones, 16/ Defendants maintain that "the same result is reached under a substantive due process analysis under the Fourteenth Amendment." This argument, like the above, has obvious shortcomings. First, Defendants reliance on Cameron is misplaced. The decision in Cameron was very narrow in scope, the court stating that it "prefer[ed] to plow a furrow no wider than the case demand[ed]." Id. at 19. The court noted that Cameron's claims were not really "right to treatment" claims, but rather claims regarding standards for the treatment he was already receiving. Id.

The court in Cameron, in dicta, cited Youngberg vs. Romeo, 457 U.S. 307 (1982), as the only guidance available from the Supreme Court on a constitutional right to treatment, and asserted that Youngberg had held that there was a constitutional entitlement only to freedom "from any but necessary restraints" and to "basic self-care training to secure safety and mobility." Id. at 18. The Cameron court did not note that, because of his severe retardation, the respondent was seeking basic self-care training as his only treatment. Youngberg, 457 U.S. at 317-19. Indeed, the Supreme Court in Youngberg concluded that due process required the state to provide the "minimally adequate or reasonable" treatment sought by the respondent. Id. at 319. Thus, while the Supreme

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[16] 990 F.2d 14 (1st Cir. 1993).



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Court has not articulated any "broad constitutional 'right to treatment,'" Cameron, 990 F.2d at 18, it has been recognized that, persons like Battista who have been civilly-committed, are guaranteed greater protection than those required by the constitutional minima. See Langton vs. Johnston, 928 F.2d 1206, 1207 (1st Cir.1991). See Martel vs. Fridovich, 14 F.3d 1, 3 (1st Cir. 1993)(citing Langton); see also King vs. Greenblatt, 53 F.Supp.2d 117, 138 n.44 (1st Cir.1999)(citing to cases under G.L. c.123A).

In the case at hand, Defendants have simply provided no evidence whatsoever. Not even so much as an attempt to dispute the facts that, aside from Battista's original commitment being based in part around her gender issues, <sup>17/</sup> Defendants own prior and current treatment providers, contracted to provide sex offender specific services, have in numerous reports made Battista's gender issues "a necessary component of her sex offender treatment." <sup>18/</sup> See, e.g., Cameron vs. Tones, 783 F.Supp. 1511, 1522 (D.Mass.1992)(,..."Dr. Jurgela have stated that anger management is a necessary component of Cameron's treatment plan")(citing Clark vs. Cohen, 613 F.Supp. 684, 704 (E.D.Pa.1985)(holding that

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[17] Complaint, ¶¶19-25.

[18] Complaint, ¶¶28 & 30. Here, contrary to Defendants implication, Cognitive Behavioral Modification Therapy, the clinical methodology employed by Defendants prior and current treatment providers, encompasses several components. To which "gender identity treatment" is included. See generally, Rehabilitation & Treatment Program for the Massachusetts Treatment Center, Justice Resource Institute Data Sheet(Attachment 6). Note sections pertaining to PSYCHOLOGICAL SERVICES("A29 gender identity counseling"); and MEDICAL SERVICES("E6 evaluation for sex hormone treatment"). Moreover, in a recent Annual Review of Battista's treatment progress, in preparation for the court's review of her "current" sexual dangerousness under G.L. c.123A, §9, Defendants current treatment providers, have also determined her gender issues to be both "necessary" as well as "therapeutic." (Attachment 7). Note page-2(2004-2005 Community



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to be entitled to deference the treatment "decision has to be based on medical or psychological criteria and not on exigency, administrative convenience, or other non-medical criteria"), aff'd 794 F.2d 79 (3d Cir.1986)). It is beyond "conscience shocking," and inconceivable to even entertain the notion of detaining a person for treatment and rehabilitation, then arbitrarily withhold treatment once prescribed. See, e.g., Leamer vs. Fauver, 288 F.3d 532, 546-47 (3d Cir.2002).

III. In REPLY to Defendants Contention that Battista's Treatment Has Not Been Implemented "Because the Department of Correction's Health Services Division Has Raised Concerns Regarding the Competence of the Fenway Community Health Clinic's Evaluation of Battista"

Here, Defendants argue that, Battista's treatment has not been implemented because "the Department of Correction's Health Services Division has raised concerns regarding the competence of the Fenway Community Health Clinic's evaluation of Battista." Defendants seem to have based these concerns, in part, on an alleged "medical peer review" conducted by a Cynthia Osborne of the Fenway Clinic's evaluation of another prisoner 19/ who was evaluated and approved(recommended) for [sex reassignment surgery]. (Weiner Aff., at ¶6). And based upon the findings in that peer review, have decided to conduct similar peer reviews of not only

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Access Board Goal Recommendations); page-3(Other Therapeutic Activities); page-5(Status); and page-8(Clinical Formulation).

[19] Here, Battista speculates that the [other inmate] referred to in Defendants pleadings, recently evaluated and recommended for sex reassignment surgery by the Fenway Clinic, is the plaintiff in the Kosilek decision, supra.



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Battista's evaluation, [but all] inmates previously evaluated by the Fenway Clinic. (Weiner Aff., ¶6). Talk about "ethics," one should question the ethics of a proclaimed expert that would even consider questioning the competence of three of her peers, simply based on the above, as well as reports that are stale and well over five years old.

With all respect to the court, Battista prays that the court is not "blind" here to the Defendants agenda. Because it is quite obvious to this Plaintiff that Defendants went out "doctor shopping" to "purchase an opinion" to go along with it's argument.<sup>20/</sup> For example, the alleged "peer review" being conducted by Defendants recently retained expert, Cynthia Osborne, is anything but a "medical peer review" for several reasons. First, the statute pertaining to [medical peer reviews], 21/ G.L. c.111, §1, does not apply to medical services provided by the Department of Correction, as the Department of Correction is not a licensed hospital. Second, Defendants are not required by law to establish a "medical

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[20] It is this very type of behavior why a prominent Boston Psychiatrist, L. Vernon Briggs, who, in 1921, was impelled to draft and sponsor the legislation, what was originally referred to as "The Briggs Law," because of what he characterized as the "almost inconceivable futile, cruel and wasteful" methods employed at the time to determine the mental responsibility of a defendant. Dr. Briggs felt that "purchased opinions" were giving the profession of psychiatry a bad reputation and that "battles of experts so confused the jury and the court that medical evidence was disregarded." See Flowers, *The Psychiatric Examination of Offenders in Massachusetts*, in Hock Zubin, *Psychiatry and the Law* 97, 101 (1955).

[21] The objective of a "medical peer review" is rigorous and candid evaluation of a professional's performance by a providers peers. See *Beth Israel Hosp. Assn. vs. Bd. of Reg. in Med.*, 401 Mass. 172, 182-83 (1987); see also *Fowles vs. Linges*, 30 Mass.App.Ct. 435, 441 & n.8 (1991).



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peer review committee." 22/ The purpose of a medical peer review committee is not to recommend treatment for patients, but is to evaluate the services provided and determine if the health care providers should be disciplined. See Swatch vs. Treat, 41 Mass.-App.Ct. 559, 563 (1996)(quoting Beth Israel Hosp. Assn., 401 Mass. at 182-83)). Here, Defendants have not provided this court with any evidence that the Fenway Clinic was treating Battista. And therefore, cannot substantiate it's position that Battista's evaluation by the Fenway Clinic is undergoing "peer review." However, to the extent that Defendants attempt to question the competence of the Fenway Clinic's evaluations, there exist a proper mechanism for making such complaints. 23/ See, also, e.g., Swatch, 41 Mass.App.Ct. at 560.

Finally, an administrative agency's decision must be supported by substantial evidence, defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Pyfrom vs. Commissioner of Public Welfare, 39 Mass.App.Ct. 621 624 (1996) (quoting G.L. c.30, §1)). "In order to determine if an agency's decision is supported by substantial evidence, one must examine the entire administrative record and take into account whatever

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[22] A "medical peer review committee" is defined in part, as a "committee of a state or local professional society of health care providers...which...has as its function the evaluation or improvement of the quality of health care rendered by providers of health care services, the determination whether health care services were performed in compliance with applicable standards of care...." G.L. c.111, §1, as appearing in St.1987, c.579, §1.

[23] The procedures for lodging such complaints in Massachusetts can be seen at: <http://www.state.ma.us/reg/boards/py/cmr/25101.htm> or at: [www.state.ma.us/ethics](http://www.state.ma.us/ethics).

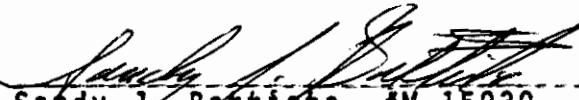


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detracts from its weight." Id. at 624-25, citing New Boston Garden Corp. vs. Assessors of Boston, 383 Mass. 456, 466, (1991). If the evidence points to an overwhelming probability to the contrary, the agency's decision may be set aside. Pyfrom, 39 Mass.App.Ct. at 625, quoting New Boston Garden Corp., 383 Mass. at 466. Therefore, Battista has established the likelihood of success on the merits of her claim that the Defendants, administrative officials, are unlawfully interfering with her [prescribed treatment].

Dated: 8/5/05 .


Respectfully submitted,

  
Sandy J. Battista, #M-15930  
Plaintiff/Pro-se  
Mass. Treatment Center  
30 Administration Rd.  
Bridgewater, Mass. 02324-3230

CERTIFICATE OF SERVICE

I, Sandy J. Battista, plaintiff, acting pro-se in the enclosed matter, on oath, hereby certify's that I have today mailed a true and accurate copy of the within documents on each counsel of record for the Defendants, separately, via first class mail postage prepaid, by hand/mail.

Dated: 8/5/05 .

  
Sandy J. Battista, #M-15930  
Plaintiff/Pro-se



ATTACHMENT 1



NOTIFY

COMMONWEALTH OF MASSACHUSETTS

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SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 97-3487A

SANDY-JO BATTISTA

- 4 1998

vs.

COMMONWEALTH OF MASSACHUSETTS & others<sup>1</sup>

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS,  
OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Before this Court is the defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment.<sup>2</sup> The pro se plaintiff, Sandy-Jo Battista ("Battista"), an inmate in the custody of the Massachusetts Department of Correction (the "Department"), alleges violations of the United States and Massachusetts Constitutions, as well as violations of 42 U.S.C. § 1983 and § 1988, the Massachusetts Civil Rights Act, and other state laws.<sup>3</sup> The foregoing causes of action arise from what

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<sup>1</sup>Larry DuBois, Paul L. DiPaolo, Kathleen M. Dennehy, Maureen Banks, Lorene Melvin, Dr. Arthur Brewer and Correctional Medical Services. Dr. Victoria Russell was released from this action on December 8, 1997 due to improper service. Dr. Russell's Motion for Separate and Final Judgment was granted on January 1, 1998. The defendants in this footnote are sued in their official and individual capacities.

<sup>2</sup>Throughout this opinion, the phrase "the defendants" refers only to those defendants who have filed this joint motion: The Commonwealth of Massachusetts, Larry DuBois, Paul L. DiPaolo and Kathleen M. Dennehy.

<sup>3</sup>Alleged violations of 42 U.S.C. § 1981, § 1985, § 1986, Article 12 of the Massachusetts Declaration of Rights, and common law negligence, medical malpractice and retaliatory punishment claims were voluntarily dismissed on December 8, 1997. Dismissal of the negligence claims includes claims asserted under the Massachusetts Tort Claims Act (G. L. c. 258, § 2 (1988 ed.)).



Battista claims was inadequate medical treatment for an alleged gender identity disorder and a vascular condition. In support of their motion, the defendants assert that Battista's claims lack merit because they are deficient with respect to various required elements. Moreover, the defendants, who are public officials, assert that even if the record contains enough evidence to defeat their motion, the defendants are immune from suit. This Court will resolve this matter applying summary judgment standards. For the reasons set forth below, the defendants' Motion for Summary Judgment is ALLOWED.

#### I. BACKGROUND

Because this Court treats the defendants' motion as one for summary judgment, the facts are gathered from Battista's verified complaint and the parties' affidavits and exhibits in support of their memoranda.

On February 28, 1983, Battista began serving a 12-20 year sentence for rape of a child under 16 and concurrent sentences for armed robbery and kidnaping at the Plymouth House of Correction. Battista was transferred to MCI-Norfolk, a prison in Norfolk County, Massachusetts, on October 4, 1995. Shortly thereafter, on November 20, 1995, the Norfolk Probate Court approved Battista's request to change his name from "David Edward Megarry, Jr." to "Sandy-Jo Battista."<sup>4</sup>

The Department maintains Health Services Units ("HSU") at its prisons to provide medical care to inmates. The HSU is

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<sup>4</sup>To avoid confusion, the Court will refer to Battista using feminine pronouns.



staffed by privately employed medical personnel from Correctional Medical Services ("CMS"). CMS is responsible for all aspects of medical care provided at the prisons.

As early as October 24, 1995, shortly after his transfer to MCI-Norfolk, Battista sought treatment for a gender identity disorder, specifically known as transsexualism, from the prison's mental health staff. At that time, Battista did not appear to suffer from any psychological difficulties. He was told to contact the prison mental health staff as necessary.

In December 1996, and again in January 1997, Battista requested that he be evaluated as a transsexual and be provided with treatment for the alleged disorder. On approximately January 3, 1997, Kathleen M. Dennehy ("Dennehy"), then the Associate Commissioner for Classification, Programs and Health Services, received a letter from Battista in which she asked Dennehy to intervene because Battista had not been given the treatment she requested. Dennehy received a second letter on approximately January 20, 1997 requesting a prison transfer to one of several states which allegedly provided treatment for transsexuals. Battista further requested that she be provided with hormone treatment and that she wanted to have her testicles removed, but that she was not asking the department to fund a sex change operation. Battista sent several additional letters to Dennehy over the succeeding weeks stating similar requests.

In response to the letters, on February 11, 1997, Dennehy requested that the Department's senior psychiatric consultant, Dr. Victoria Russell ("Russell"), conduct a peer review of



Battista's medical treatment at MCI-Norfolk. Furthermore, Dennehy requested that a psychiatrist review Battista's medical records. Russell completed her peer review of Battista's medical records on March 17, 1997. In her report, Russell suggested that Battista be examined by an endocrinologist, that she undergo psychological testing, and that she be offered counseling. Dennehy shared Russell's evaluation with the medical director of CMS.

Pursuant to Russell's suggestions, Battista was examined by an endocrinologist, Dr. Maria R. Warth ("Warth"); at the Lemuel Shattuck Hospital on April 15, 1997. On the basis of the examination, Dr. Warth recommended that Battista be evaluated by a gender change counselor for her alleged transsexualism. Battista had a follow-up visit with Warth on May 13, 1997. Warth again recommended that Battista receive counseling for her alleged gender identity disorder.

On May 15, 1997, as a result of Russell's and Warth's recommendations, the Director of Mental Health notified Battista that she would be scheduled to undergo a battery of psychological tests and that she would receive counseling on an ongoing basis. In response, Battista stated that she would only accept counseling if a specialist in gender identity issues provided or supervised the treatment. Battista also said that she would refrain from talking with the prison's mental health staff because they had recently placed her on suicide watch. She further threatened to castrate herself if her issues were ignored. Battista did, however, submit to a series of



psychological tests over a two week period between May 20, 1997 and June 17, 1997.

On June 18, 1997, medical, mental health and health services administration staff met for a case conference regarding Battista. The purpose of the conference was to develop a comprehensive response to Battista's condition in light of her refusal to meet with the mental health staff. At the conference, it was decided that a senior psychiatrist would consult with the mental health staff regarding Battista's treatment. A treatment plan was developed by MCI-Norfolk's Director of Mental Health Services and presented to Battista on June 18, 1997. Battista reiterated that she was not interested in receiving therapy from the prison's mental health staff. Battista has since met with the mental health director twice: July 18, 1997 and July 22, 1997. She has never been diagnosed by a medical professional as a transsexual.

In addition to the alleged gender identity disorder, Battista suffers from varicose veins. She was diagnosed with the condition in 1993, while incarcerated at the Plymouth House of Correction. She was examined by CMS doctors on multiple occasions. During one visit, on January 27, 1993, Battista acknowledged that she did wear therapeutic stockings for a "few days but had no relief." Battista was referred to the Lemuel Shattuck Hospital, and was told to go to the hospital's brace clinic to be fitted for a pair of calf high stockings.

On February 7, 1996, CMS ordered stockings for Battista.



She received one pair of stockings on April 17, 1996. On April 26, 1996, Battista received two more pairs. By December 18, 1996, the stockings issued to Battista were "worn out" and "lost through the institutional laundry." On December 20, 1996, Melvin indicated to Battista that new stockings would be ordered and that a doctor would review her request to be treated at the Lemuel Shattuck Hospital. To this point, Battista had not been measured to insure proper fit of the stockings. Melvin confirmed her actions in a memo to Battista dated January 2, 1997. In accordance with her request, Battista was seen by a CMS doctor on January 7, 1997. Melvin again, on January 14, 1997, advised Battista that stockings had been ordered for her.

On January 20, 1997, Battista requested she be seen at the Lemuel Shattuck Hospital's vascular/surgical clinic (the "Clinic"). She was seen by doctors from the Clinic on February 3, 1997. During the visit, she was given a prescription for thigh-high stockings. In a letter dated March 11, 1997, Battista acknowledged having one pair of properly fitted stockings. In the letter she requested an additional pair.

On April 28, 1997, during another examination at the Clinic, Battista was measured for support stockings. She was prescribed thigh-high support stockings to alleviate the discomfort associated with her vascular condition. In addition, Battista was advised that surgery to correct the condition was not necessary. In an undated letter Battista received between April 28, 1997 and May 1, 1997, medical personnel at the Clinic



acknowledged Battista's receipt of thigh-high stockings.

## II. DISCUSSION

### A. Standard for Summary Judgment.

This court grants summary judgment when there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). A court will grant summary judgment to the party entitled to judgment as a matter of law where "there is no real dispute [concerning] the salient facts," or where the issues at hand involve questions of law. Cassesso, 390 Mass. at 422. The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party's case or by showing that the nonmoving party has no reasonable expectation of proving an essential element of its case at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact. Pederson, 404 Mass. at 17. The nonmoving party cannot defeat



summary judgment by resting on his or her pleadings and mere assertions of disputed facts to defeat the motion. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

B. The Claims.

1. 42 U.S.C. § 1983.

Battista alleges that his civil rights were violated by the state and various other defendants. Specifically, Battista brings Section 1983 claims for violations of the First, Eighth and Fourteenth Amendments of the United States Constitution. Battista seeks both monetary and equitable relief.

a. Action against the Commonwealth of Massachusetts.

The United States Supreme Court, in Will v. Michigan Dept. of State Police, held unequivocally that a State is not a "person" subject to suit under Section 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Given the foregoing rule, the Commonwealth is entitled to judgment as a matter of law on all Section 1983 claims.

b. Action against the defendants, other than the Commonwealth, in their official capacities.

1. Monetary relief.

State officials acting in their official capacities are not "persons" subject to suit for monetary damages under Section 1983. Will, 491 U.S. at 71. Although "state officials literally are persons," a suit against a state officer in his or her



official capacity "is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the State itself." *Id.* A person cannot recover monetary damages against the state under Section 1983. The defendants, other than the Commonwealth, insofar as they are sued in their official capacities, are entitled to judgment as a matter of law on Battista's claims for money damages under Section 1983.

## 2. Prospective equitable relief.

A state official in his or her official capacity, when sued for prospective equitable relief, is a "person" under Section 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Id.* Defenses of immunity available to state officials sued personally are not available when they are sued in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985).

### a. First Amendment rights.

Given the voluminous and ambiguous filings in this case, this Court has been assigned the arduous task of discerning the rights Battista is asserting. In her opposition brief, she seems to attempt to support the allegation that the defendants' refusal to place her in a facility that treats transsexuals amounts to a violation of the First Amendment. That claim has no legal basis, and is thus without merit. Furthermore, there is no question



that a prison inmate does not have the constitutional right to cross-dress as a woman, even in a "limited" manner. See Star v. Gramley, 815 F. Supp. 276, 278 (N.D. Ill. 1993). Summary judgment must be granted here.

b. Eighth Amendment rights.

"Deliberate indifference" to the "serious medical needs" of a prisoner constitutes cruel and unusual punishment, in violation of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 102-103 (1976). "A prison official exhibits deliberate indifference when the official actually 'knows of and disregards' a prisoner's serious medical needs." Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996), quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994). The official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. Farmer, 511 U.S. at 837. Thus, the failure to treat a medical condition does not constitute punishment within the meaning of the Eighth Amendment unless prison officials knew that the condition created a risk to the inmate's health and then failed to act on that knowledge. Long, 86 F.3d at 765. Moreover, nothing in the Eighth Amendment proscribes prison doctors from exercising their independent medical judgment. Id. Prisoners do not have the right to a particular type of treatment. Id. Prison officials do not violate the Eighth Amendment when, in the exercise of their professional judgment, they refuse to implement a prisoner's



requested course of treatment. Id.

The Court has considered whether Battista suffers from transsexualism and whether transsexualism presents a "serious medical need." In this consideration, the Court has found that it is Battista who has diagnosed herself as a transsexual. She has failed to proffer reliable evidence, such as a medical diagnosis rendered by a physician, confirming her assertion.<sup>5</sup> In fact, the record reveals numerous instances in which Battista admits that she has not been officially diagnosed as a transsexual. Self-diagnosis of a "medical problem" is a far cry from one in which treatment has been mandated by a physician. Thus, this Court seriously doubts whether Battista will be able to put forth any evidence of a "serious medical need" at trial. See Johnson v. Busby, 953 F.2d 349, 351 (8th Cir. 1991) (a "serious medical need" is one which has been diagnosed by a physician as mandating treatment); Laaman v. Helgemoe, 437 F. Supp. 269 (D.C. N.H. 1977) ("serious medical need" is one which has been diagnosed by a physician or one which is so obvious that even a lay person would easily recognize the necessity for a doctor's attention).

Even assuming, however, that Battista is indeed a transsexual, and that transsexualism presents a "serious medical

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<sup>5</sup>Note that even if Battista provided reliable evidence of her alleged condition, at least one court which previously held that transsexualism was a "serious medical need" has questioned that holding in light of the United States Supreme Court's decision in Farmer, 511 U.S. at 825, and subsequent cases. See Long, 86 F.3d at 765 n.3.



need," summary judgment must still be granted. The record indicates that the defendants were aware of Battista's apparent psychological problems. The record, however, fails to show any "deliberate indifference" on the part of the defendants. In fact, the record is replete with uncontested evidence of the attempts of the prison medical staff to evaluate Battista's psychological problems and her refusal to cooperate.

In an attempt to defeat summary judgment, Battista directs this Court to an endocrine consultation report completed by Dr. Warth. In the report, Warth indicated that Battista should be "evaluated" by a "gender change counselor." In a report made approximately one month later, Warth again indicated that Battista should receive "counseling" for her "gender issues." Battista claims that because prison officials failed to comply with Warth's recommendation, the defendant's acted with "deliberate indifference." Those facts, however, are not enough to defeat summary judgment. The argument put forth by Battista mirrors an argument made by the plaintiff in Long v. Nix. In Long, the plaintiff, who claimed to be a transsexual, brought a claim of "deliberate indifference" against a prison doctor for not prescribing tranquilizers. Long, 86 F.3d at 766. Another doctor, who specialized in the diagnosis and treatment of gender identity disorders, prescribed tranquilizers, among other treatments, for the plaintiff after a psychiatric examination. Id. at 764. Recognizing that a dispute over medical treatment does not rise to a level of "deliberate indifference," the Long



Court held that the prison doctor's failure to provide the plaintiff with tranquilizers did not constitute an Eighth Amendment violation. Id. at 766.

Here, as in Long, there is a dispute over a course of treatment. Dr. Warth recommended that Battista be "evaluated" by a "gender identity counselor." The defendants, on the other hand, have offered Battista counseling, though not by a specialist in gender identity disorders. Given the holding in Long, the dispute over the treatment offered to Battista in no way rises to a level of "deliberate indifference." See also, Meriwether v. Faulker, 821 F.2d 408, 413-414 (7th Cir. 1987) (a decision regarding the treatment to be given to an alleged transsexual should be determined by reliance on professional judgment). The defendants have satisfied their burden of showing that Battista has no reasonable expectation of proving "deliberate indifference" at trial. As the nonmoving party, Battista has failed her burden of producing evidence that would create an issue of material fact, thereby defeating summary judgment on this count of the complaint. Summary judgment must, therefore, be granted here.

A similar conclusion is warranted regarding the prison medical staff's treatment of Battista's vascular condition.<sup>6</sup> Given the record provided to the Court in this case, no reasonable fact-finder could find that the defendants' actions,

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<sup>6</sup>It is clear that Battista's vascular condition presents a "serious medical need." Battista was diagnosed with varicose veins by a qualified physician as early as 1993.



or lack thereof, amounted to "deliberate indifference." The record reveals that on multiple occasions, the defendant Dennehy ordered Battista's prescribed support stockings. Further, the record indicates that Battista was in possession of stockings for lengthy periods. Her assertion that the defendants were "deliberately indifferent" to her needs because she was at times limited to one pair of stockings, and thus could not comply with her instructions to wear them daily, results from an undue expansion of the phrase "deliberate indifference." The record shows unequivocally that the defendants did not fail to act on the knowledge that Battista had a legitimate medical condition that required therapeutic stockings. Lastly, as for Battista's repeated claims that the defendants consistently ordered stockings without taking proper measurements to insure proper fit, nothing in the record indicates that the defendants, who were not doctors, knew that measurements were required.

c. Fourteenth Amendment rights.

This Court assumes that Battista asserts a Fourteenth Amendment claim, not as an independent cause of action, but to properly assert her other claims for deprivations by state officials of specific protections defined in the Bill of Rights (First and Eighth Amendments).

If Battista does, however, assert a separate Fourteenth Amendment violation, it is not clear from Battista's complaint whether she is claiming deprivation of her procedural or



substantive due process rights. Given the context of the suit, gleaned from the record, this Court assumes she is alleging violation of the latter.

In Graham v. Conner, the United States Supreme Court held that it is improper in a Section 1983 action to rely on a substantive due process claim when there is a specific constitutional standard that governs a plaintiff's claimed right. Graham v. Conner, 490 U. S. 386 (1989). Applying the Graham rule, a Federal District Court held that a plaintiff who has brought a Section 1983 claim for an alleged violation of the Eighth Amendment, which provides explicit constitutional protection to prisoners against cruel and unusual punishment, cannot bring a separate, independent claim under Section 1983 for the same behavior based on substantive due process. Warren v. State of Missouri, 754 F. Supp. 150, 153-154 (W.D. Mo. 1990), affirmed 995 F.2d 130 (8th Cir. 1993). Like the plaintiff in Warren, Battista is barred from asserting separate claims under the Eighth and Fourteenth amendments for the same alleged behavior. Similarly, it follows logically from Graham and Warren that Battista cannot assert First and Fourteenth Amendment claims for the same behavior based on substantive due process. In light of the Graham and Warren decisions, summary judgment must be entered for the defendants on any independent Fourteenth Amendment claim, as a matter of law.



c. Action against the defendants, other than the Commonwealth, in their personal capacities for monetary damages and prospective equitable relief.

State officials sued for money damages in their official capacity are not "persons" for purposes of suit under Section 1983 because they assume the identity of the government that employs them. Hafer v. Melo, 502 U.S. 21, 27 (1991). Officials sued in their personal capacities, however, come to court as individuals, and are, thus, "persons" under Section 1983. Hafer, 502 U.S. at 27.

Recovery, however, may be barred by the officials' qualified immunity. Kentucky, 473 U.S. at 166-167; O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 142 (1993). When government officials who are performing discretionary functions are sued individually, they have qualified immunity from suits for damage liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The standard is objective, and its application to the defendants' conduct is a question of law. Hunter v. Bryant, 112 S. Ct. 534, 537 (1991). The plaintiff's rights must be clearly established so that a "reasonable official" would understand that his or her actions violate those rights. Rizzo v. Goode, 423 U.S. 362, 371 (1976). The official "is not expected to determine the manner in which the law's grey areas will be clarified and defined." Borucki v. Ryan, 827 F.2d 836, 839 (1st Cir. 1987). If a right is clearly established, an inquiring court can presume



that the defendant knew, or should have known, that his conduct was beyond the pale. See Harlow, 457 U.S. at 818-819.

1. First Amendment rights.

Summary judgment must be granted here given the analysis of Battista's First Amendment claim against the defendants in their official capacities for prospective equitable relief. There is no evidence that the defendants have violated a "clearly established" right protected by the First Amendment. See Star, 815 F. Supp. at 279 (court held that plaintiff had no "clearly established" right to cross-dress).

2. Eighth Amendment rights.

Again, this Court is called upon to discern what actions Battista is alleging violated her constitutional rights. Regarding her alleged transsexualism, it seems that Battista is claiming that she has a right to be examined by a qualified gender specialist, and that the defendants' refusal to comply with her request amounted to "deliberate indifference" to a "serious medical need." See Singer v. State of Maine, 49 F.3d 837, 845 (1st Cir. 1995) (the inquiry into whether the right at issue was "clearly established" properly focuses "not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged.")). That claimed right, however, is contrary to well-settled law. As this Court recognized above, prisoners do not have the right to a



particular type of treatment. Long, 86 F.3d at 765. Moreover, prison officials do not violate the Eighth Amendment when, in the exercise of their professional judgment, they refuse to implement a prisoner's requested course of treatment. Id.

The dispositive fact here is that Battista was offered treatment for her perceived psychological maladies. Battista does not dispute this. As stated previously, the record indicates that the defendants were aware of Battista's apparent psychological problems, and that appropriate treatments were offered. Furthermore, it is clear that the defendants recognized that there may be a connection between Battista's psychological problems and her congenital adrenal/endocrine condition. Battista has failed to point this Court to any precedent that supports the proposition that inmates are entitled to the medical treatment of their choice, and that refusal to provide the requested treatment amounts to "deliberate indifference." See Quintero de Quintero v. Aponte-Rogue, 947 F.2d 226, 228 (1st Cir. 1992) (when a defendant moves for summary judgment on the basis of qualified immunity, it is the plaintiff's burden to demonstrate the defendant's infringement of a "clearly established" right).

Lastly, Battista fails to cite precedent, properly interpreted, which creates liability for prison officials under the Eighth Amendment for relying on judgments of medical personnel regarding the appropriate level of medical care for her. On the contrary, a variety of courts have held just the



opposite. See, e.g., Rosen v. Chang, 811 F. Supp. 754 (D. R.I. 1993) (granting qualified immunity to prison administrator who relied on physician's judgment regarding the appropriate level of medical care to be given to an inmate); Miltier v. Boern, 896 F.2d 848 (4th Cir. 1990) (wardens not liable for alleged deliberate indifference to inmate's serious medical needs where wardens insured that inmate received medical treatment and there was no suggestion why they should not have been entitled to rely on their health care providers' expertise).

Moreover, as this Court recognized above, the defendants have shown that Battista will not be able to produce evidence at trial that would support a claim of "deliberate indifference" regarding her vascular condition. Battista has again failed to satisfy her burden of putting forth evidence of "deliberate indifference." As to the counts against the defendants in their personal capacities, qualified immunity applies and summary judgment must be granted as a matter of law.

### 3. Fourteenth Amendment rights.

Summary judgment must be granted here given the analysis of Battista's independent Fourteenth Amendment claim, if any, against the defendants in their official capacities for prospective equitable relief. There is no evidence that the defendants have violated a "clearly established" right protected by the Fourteenth Amendment.



2. 42 U.S.C. § 1988.

Regarding Battista's Section 1988 claim, it is well established that Section 1988 does not create an independent cause of action. North Carolina Dep't of Transp. v. Crest Street Community Council, Inc., 479 U.S. 6, 14 (1986); Schroder v. Volcker, 864 F.2d 97, 99 (10th Cir. 1988). Rather, the statute "defines procedures under which remedies may be sought in civil rights actions." Schroder, 864 F.2d at 99. Therefore, the defendants are entitled to judgment as a matter of law on the Section 1988 claim.

3. The Massachusetts Civil Rights Act ("MCRA") (G. L. c. 12, §§ 11H and 11I).

a. Claim against the Commonwealth.

In Commonwealth v. ELM Medical Laboratories, Inc., the Massachusetts Appeals Court held that the Commonwealth is not a "person" for the purposes of the MCRA. Commonwealth v. ELM Medical Laboratories, Inc., 33 Mass. App. Ct. 71, 76 (1992). Thus, summary judgment is granted for the Commonwealth as a matter of law.

b. Claims against the defendants other than the Commonwealth.

The Supreme Judicial Court has stated that it is "consistent with the intent of the Legislature in enacting the Civil Rights Act to adopt thereunder the standard of immunity for public officials developed under § 1983." Duarte v. Healy, 405 Mass.



43, 47 (1989). Accordingly, officials are not liable under the MCRA for their discretionary acts, unless they have violated a right under Federal or State constitutional or statutory law that has "clearly established" at the time. Duarte, 405 Mass. at 47.

This Court has already determined that the defendants are immune from suit as a matter of law on her federal claims. Thus, the defendants also enjoy immunity from suit under the MCRA for alleged deprivations based on federal law.

As to Battista's claims under the MCRA for alleged deprivations based on state law, the state act and Section 1983 differ in one significant respect; to establish a state civil rights violation, plaintiff must prove that the defendants interfered with or attempted to interfere with constitutional or statutory rights by use of "threats, intimidation or coercion." Freeman v. Planning Bd. Of West Boylston, 419 Mass. 548, 564 (1995). The defendants have shown that evidence of this required element is not likely to be forthcoming at trial. Further, Battista has failed to point to specific evidence in the record that rebuts the defendants' charge that evidence of "threats, intimidation or coercion" does not exist. Summary judgment is therefore warranted here.

4. G. L. c. 30A, § 7 and G. L. c. 231A.

Unless an exclusive mode of review is provided by law, judicial review of agency regulations is to be gained through a petition for declaratory relief. G. L. c. 30A, § 7 (1992 ed.).



There being no exclusive mode provided by G. L. c. 124, § 1 (1991 ed.), the statute giving the Commissioner of Correction the power to promulgate rules and regulations, or elsewhere, an action under G. L. c. 231A is the appropriate procedure to challenge the commissioner's regulations. Claims filed pursuant to c. 30A, § 7 challenge the general substantive validity of a regulation and not the way it was specifically applied to the individual plaintiff. Rate Setting Commission v. Baystate Medical Center, 422 Mass. 744, 747 (1996).

The issue on review is not whether the regulation has supported by substantial evidence in the record before the agency. Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707, 721 (1983). Rather, the person challenging the regulation must prove in the judicial proceeding that the regulation is illegal, arbitrary or capricious. Borden, 388 Mass. at 722. A plaintiff must prove "the absence of any conceivable ground upon which [the rule] may be upheld." Id.

Battista brings this substantive challenge to 103 CMR 932 et. seq. (medical and mental health policies), arguing that its promulgation was illegal, arbitrary and capricious.<sup>7</sup> The record

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<sup>7</sup>In her complaint, Battista identifies the challenged regulations as 103 CMR 630.00 et. seq. (medical policies), 103 CMR 650.00 et. seq. (mental health policies), and 103 CMR 400.00 et. seq. (inmate management policies). The indicated regulations do not exist. Construing the complaint with a liberal eye, the Court has identified 103 CMR 761 et. seq. as the regulations relevant to medical and mental health policies. See Estelle, 429 U.S. at 97 (inmate's pro se complaint should be liberally construed). Regarding the regulations governing "inmate management policies," this Court views almost every Department of Correction regulation as falling under the rubric of "inmate



is devoid of evidence that would show an "absence of any conceivable ground" to justify the existence of the regulation at issue. Thus, summary judgment must be granted here.

5. Article 26 of the Massachusetts Declaration of Rights.

Article 26 of the Declaration of Rights prohibits the infliction of cruel or unusual punishments. The Supreme Judicial Court has read Article 26 to be at least as broad as the Eighth Amendment to the Federal Constitution. Good v. Commissioner of Correction, 417 Mass. 329, 335 (1994). Furthermore, the Court has not decided whether Article 26 affords a plaintiff greater rights than those protected by the Eighth Amendment. See Libby v. Commissioner of Correction, 385 Mass. 421, 435 (1982); Cepulonis v. Commonwealth, 384 Mass. 495, 496-497 n.2 (1981).

As stated, "deliberate indifference" to "serious medical needs" of inmates violates the Eighth Amendment. Estelle, 429 U.S. at 104.

Even if Battista's gender identity disorder, if properly diagnosed, evidences a "serious medical need," this Court has determined that there is no evidence that the defendants acted with "deliberate indifference." Moreover, as to Battista's vascular condition, this Court concluded that the record contains no evidence of "deliberate indifference."

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management." As such, the Court doubts that Battista meant to challenge every regulation relating to "inmate management," and focuses its analysis on the regulations dictating medical and mental health policies.

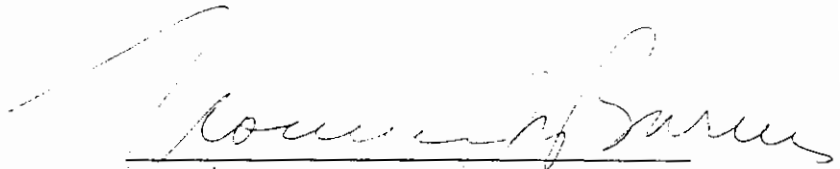


This is not the case to consider extending Article 26 rights beyond those protected by its federal counterpart. Given this Court's analysis regarding Battista's Eighth Amendment claims, summary judgment must be granted on the Article 26 claims.



ORDER

For the foregoing reasons, as to the defendants the Commonwealth of Massachusetts, Larry DuBois, Paul L. DiPaolo and Kathleen M. Dennehy, their joint Motion for Summary Judgment is ALLOWED.



Nonnie S. Burnes  
Justice of the Superior Court

DATED: June 1, 1998



A T T A C H M E N T   2





University of  
Massachusetts  
Medical School

UMass Correctional Health  
One Research Drive, Suite 120C  
Westborough, MA 01581

November 30, 2004

Sandy J. Battista  
M-15930  
Massachusetts Treatment Center  
30 Administration Rd.  
Bridgewater, MA 02324-3230

Dear Mr. Battista:

I am writing in response to your letter dated November 18, 2004. We have just received the report of your assessment conducted by clinical staff from the Fenway Community Health Center. Your mental health treatment providers at the Massachusetts Treatment Center can review the recommendations with you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth L. Appelbaum, MD'.


Kenneth L. Appelbaum, MD  
Mental Health Program Director

Cc: Diane McLaughlin, MTC mental health director

A Program of Commonwealth Medicine



A T T A C H M E N T    3







UMass Correctional Health  
Massachusetts Treatment Center/HSU  
30 Administration Road  
Bridgewater, MA 02324 USA  
508.279.8100 (office) 508.279.3338 (fax)

*A Program of Commonwealth Medicine*

4/4/05

**Mr. Battista:**

I spoke with you on Thursday, 3/31, and received your written grievance on Friday, 4/1, relating to the delay in receiving your hormone therapy. Although I can understand your frustration in having to wait so long, you must understand that this involves a process that must be followed explicitly for it to be effective and beneficial to you.

Dr. Warth prescribed the Decadron for a certain period of time, to be followed by blood work a few weeks later which has been completed, and then a follow-up visit with her in 4-6 weeks. You will be seeing her very soon to evaluate your levels, and hopefully prescribe the accurate dose of the hormone to meet your present needs. All of this takes time so that we can offer you the best care under the direct supervision by Dr. Worth, and Dr. Friedman, and reviewed by the regional Medical Director, Dr. Brewer.

I would think that you would appreciate the time that has gone into the planning stages of one of the most important events of your life. You have patiently waited this long, and now it is just a couple of weeks away before you will be on your journey of something you waited a very long time for approval.

I hope now you can understand that there is in fact 'legitimate reason' for this lengthy process, and can somewhat relate to all the reasons I listed above.

I will be following up with you after your visit with Dr. Warth.

Sincerely,

A handwritten signature in cursive script that reads 'Maryanne Percuoco' followed by a stylized '148A'.

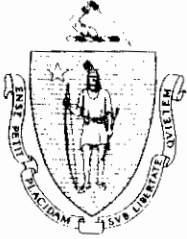
Maryanne Percuoco  
Health Services Administrator



**A T T A C H M E N T    4**







Mitt Romney  
Governor

Kerry Healey  
Lieutenant Governor

Edward A. Flynn  
Secretary

December 13, 2004

*The Commonwealth of Massachusetts*  
*Executive Office of Public Safety*  
*Department of Correction*  
*Health Services Division*

*P.O. Box 426*  
*Bridgewater, MA 02324*  
*Phone: (508) 279-8612*  
*Fax: (508) 279-8654*  
*www.mass.gov/doc*



Kathleen M. Dennehy  
Commissioner

James R. Bender  
Acting Deputy Commissioner

Sandy Jo Battista, M15930  
Massachusetts Treatment Center  
30 Administration Road  
Bridgewater, MA 02324

Dear Sandy Jo Battista:

Commissioner Dennehy has referred your letter of November 29, 2004 concerning the delay in receiving the results of your evaluation for Gender Identity Disorder to me for reply. I am also in receipt of your letters to me dated November 30, 2004 and December 3, 2004 and trust the following information will address the concerns you have raised.

The results of the evaluation have been received from Fenway Community Health and I have been advised that the contractual mental health provider met with you on December 2, 2004 to review the report and discuss the findings and recommendations. In accordance with these recommendations, a consultation request for the endocrinology clinic at Lemeul Shattuck Hospital has been submitted. Also in accordance with the recommendations, the contractual mental health provider at the Treatment Center has assigned a primary care clinician to meet with you on a monthly basis to provide support and help you cope with any issues that may arise.

In closing, I urge you to work cooperatively with both the medical and mental health providers who will be affording you the appropriate clinical treatment.

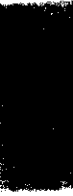
Sincerely,

Susan J. Martin  
Director, Health Services Division

cc: Diane McLaughlin, Mental Health Director, UMCH



**A T T A C H M E N T   5**





Please do not link to printable views of stories. The full story can be accessed using the link below. Thank you.  
[http://cbs4boston.com/iteam/local\\_story\\_145210838.html](http://cbs4boston.com/iteam/local_story_145210838.html)



**CBS4 | cbs4boston.com**

## Sex Changes Behind Bars

May 25, 2005 9:06 pm US/Eastern

Hard core criminals in our state prisons. You pay for their food, clothing and general medical care. Now, you may end up paying for their sex change surgery. I-Team reporter Joe Bergantino investigates what critics are calling a massive waste of taxpayer dollars.

Kenneth Catheena Hunt, serving a life sentence for first degree murder.

Sandy Jo Battista, child rapist, behind bars twenty-one years.

Michelle Kosilek, in prison for life for strangling his wife.

All three are violent criminals.

All three believe they are women trapped in men's bodies.

And all three want you to pay for their sex change operations.

The I-Team has learned there are twelve prisoners in our correction system who have either been diagnosed with or are being diagnosed for gender identity disorder. Four prisoners are receiving hormone treatments. So far, their medical care and lawsuits have cost you tens of thousands of dollars. Sex changes for all of them would cost you at least a quarter of a million dollars.

Taxpayer advocate Barbara Anderson.

Barbara Anderson, Citizens for Limited Taxation: "What bothers me about that? What doesn't bother me about that? I can't even imagine seriously considering this. Never mind doing this. Never mind paying for it."

So why is state funding for prisoner sex changes-something insurance companies won't pay for even a possibility?

Blame it on the federal court. That's where Michelle, once Robert, Kosilek took her case.

Before Kosilek sued, the state's policy was this: Individuals receiving hormone treatment before imprisonment could continue it behind bars but no sex change operations allowed.

But two years ago, Judge Mark Wolf handed down this decision saying Kosilek has a "rare, medically recognized, major mental illness" and that the state must follow doctors prescribed treatment.

Correction Commissioner Kathleen Dennehy.

Kathleen Dennehy, DOC Commissioner: "The courts are telling us that medical professionals make medical recommendations and correctional administrators assess the safety and security concerns."

Now, a doctor hired by the state is recommending that Kosilek, who has twice attempted suicide, undergo a sex change operation as treatment for her disorder.

If the state refuses to do it, Kosilek will ask the federal court to order the surgery, at your expense.



## CBS4: Sex Changes Behind Bars

Page 2 of 2

Senator Scott Brown: "I think it's unconscionable that the Commonwealth of Massachusetts and the citizens of the Commonwealth would have to pay for any type of elective sex change operations for any prisoners."

But is sex change surgery elective?

Most doctors and psychotherapists, include Diane Ellaborn, say in some cases it's medically necessary.

Joe Bergantino: "What are the consequences for these men if the state says forget about it, you're on your own, live with it, get over it?"

Diane Ellaborn: "I think the psychological consequences are severe. I think people have severe depression, severe anxiety. These could be highly suicidal prisoners usually and also prisoners that are at very high risk for self mutilation."

Denise Leclair, who once was a man, heads up the International Foundation for Gender Education.

Denise Leclair: "We should rely on what doctors say the proper course of treatment is, not subject people's medical treatment to popular vote. That seems grossly unfair."

Because of our investigation, Senator Scott Brown has filed legislation prohibiting the state from paying for prisoner sex changes.

Senator Scott Brown: "When you go to prison, you lose some rights. You also lose your rights to get a sex change operation."

Later this week, the state will tell the federal court that sex surgery for Michelle Kosilek would result in a security nightmare. When that happens, expect Kosilek to pursue her lawsuit. Then a federal judge will eventually decide whether you will pay the bill for Kosilek's operation and beyond that, sex surgeries for other convicts serving times for horrendous crimes.

Joe Bergantino

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**A T T A C H M E N T   6**



Rehabilitation & Treatment Program at the Massachusetts Treatment Center  
JUSTICE RESOURCE INSTITUTE

DATE: February 20, 1993

TO: Barbara Schwartz

FROM: Jim Maddock

RE: Individual Data Sheets for Distribution to Residents

Attached are the 227 data sheets you requested for distribution, one to each resident. Each sheet includes:

1. Resident's Name
2. Treatment Team
3. Current Housing
4. Parole and Transition Program Eligibility Status
5. Prison Wrap Up Time Data
6. Treatment Coordinator
7. Date of Last RIRB Treatment Plan
8. Current Treatment Plan

Translation keys from the back of the ISMR Yellow Book also are attached.

I suggest you call me at 727-5500 Ext.358 this week so I can answer any questions regarding the data and keys.

cc: Greg Canfield

JRI - Massachusetts Treatment Center - Information Systems

Unit Directors,  
Please attach  
this note to each  
data sheet & make  
one copy of packet  
for resident and  
one for the  
record. B



Column 25 - Treatment Plan

Each resident's RIRB recommended Treatment Plan is listed as a series of letters and numbers. Read them as follows.

Letters/Numbers before | are current assignments that should be continued. Letters/Numbers following | and preceded by - are recommendations that need to be implemented. \* at the end of a recommendation means additional recommendations would not fit in this publication but are available upon request.

RIRB Recommendation Key

## A - PSYCHOLOGICAL SERVICES

- A1 - primary group
- A2 - victim empathy group
- A3 - child abuse victim survivor group
- A4 - couples therapy
- A5 - family therapy
- A6 - Vietnam veterans group
- A7 - individual therapy
- A8 - substance abuse treatment
- A9 - ACOA
- A10 - AA/NA
- A11 - day treatment unit
- A12 - administrative caseworker
- A13 - gestalt therapy
- A14 - medications group
- A15 - guardian ad litem
- A16 - incest perpetrators' group
- A17 - psychiatric day treatment
- A18 - sex/love addiction group
- A19 - self esteem group
- A20 - Minimum Privilege Unit - detox program
- A21 - AWOL (A Way of Life) group
- A22 - Black Awareness group
- A23 - youthful offenders group
- A24 - gay identity group
- A26 - expressive therapy
- A27 - psychiatric clinic follow-up
- A28 - satellite for socialization
- A29 - gender identity ~~counseling~~
- A30 - art therapy
- A31 - music therapy
- A32 - creative writing
- A33 - drama therapy
- A34 - childhood trauma survivors' group
- A35 - lifers' group



B - ASSESSMENT SERVICES

- B1 - general educational assessment
- B2 - cognitive/intelligence testing
- B3 - personality testing
- B4 - neuropsychological screening
- B5 - full neuropsychological testing
- B6 - plethysmographic assessment
- B7 - impulse control assessment
- B8 - depression assessment
- B9 - sexual functioning assessment
- B10 - family/home assessment
- B11 - couples assessment
- B12 - substance abuse assessment
- B13 - speech therapy assessment
- B14 - SSI/SSDI assessment
- B15 - general behavioral therapy evaluation
- B16 - general needs evaluation
- B17 - competency evaluation for conservatorship/guardianship
- B18 - assessment by clinician
- B19 - assessment for learning disabilities
- B20 - case conference
- B21 - assessment by consultant psychologist

C - BEHAVIORAL TREATMENT SERVICES

- C1 - self control management
- C2 - anger management
- C3 - depression management
- C4 - relaxation training
- C5 - assertiveness training
- C6 - social skills training
- C7 - anxiety/relaxation therapy
- C8 - stress management
- C9 - relapse prevention
- C10 - orgasmic reconditioning
- C11 - covert conditioning
- C12 - systematic desensitization
- C13 - cognitive restructuring
- C14 - thought stopping
- C15 - contract group
- C16 - olfactory aversion
- C17 - fantasy group
- C18 - rational emotive therapy
- C19 - psych-physiological treatment
- C20 - individual behavioral contract
- C21 - adult heterosexual skills group
- C22 - masturbatory satiation



D - REHAB SERVICES - LEARNING CENTER/WORK

- D1 - vocational testing
- D2 - job survival skills course
- D3 - life management skills course
- D4 - sex education course (sexual knowledge)
- D5 - human sexuality course (sexual attitudes)
- D6 - heterosexual skills course
- D7 - individual tutoring
- D8 - GED/PreGED
- D9 - special needs
- D10 - college courses leading to AA/BA degree(s)
- D11 - computer courses
- D12 - PIC training
- D13 - work program
- D14 - religious
- D15 - pre-college courses
- D16 - vocational training
- D17 - volunteer services

E - MEDICAL SERVICES

- E1 - speech therapy
- E2 - dental treatment
- E3 - neurological/radiological testing
- E4 - psychopharmacological consult
- E5 - optometric/ophthalmologic services
- E6 - ~~evaluation for sex hormone treatment~~
- E7 - medical exam
- E8 - other
- E9 - referral for "Rogers" court-ordered medication
- E10 - update medical records
- E11 - ongoing psychopharmacological treatment
- E12 - HIV antibodies testing
- E13 - blood/urine screening for drugs
- E14 - HIV counseling
- E15 - hearing exam
- E16 - on-going medical treatment
- E17 - weight control program
- E18 - medical education
- E19 - physical rehab program

F - REHAB SERVICES - RECREATION

- F3 - specified structured activities
- F4 - music program
- F5 - open recreation
- F6 - arts and crafts



G - RELEASE SERVICES

- G1 - authorized absence
- G2 - sheltered workshop
- G3 - Release House relapse prevention group
- G4 - Release House group
- G5 - psychophysiological assessment and/or treatment
- G6 - case manager group
- G7 - behavioral treatment
- G8 - placement in Release House
- G9 - Release House role play group
- G10 - Release House social skills group
- G11 - Release House day treatment

H - REHAB SERVICES - VOCATIONAL/OTHER

- H1 - electronics
- H2 - mechanical
- H3 - graphic arts
- H4 - general
- H5 - Avo / O.T.

J - PLACEMENT

- J1 - placement in "...branch thereof..." of TC
- J2 - favorable parole recommendation
- J3 - unfavorable parole recommendation
- J4 - placement in outside MR facility
- J5 - placement in TC Release House
- J6 - placement in Health Services Unit
- J7 - placement in outside MR secure facility

K - PSYCHO-EDUCATIONAL CLASSES

- K1 - Anger Management
- K2 - Stress Management
- K3 - Relapse Prevention
- K4 - Human Sexuality
- K5 - Understanding Sexual Assault
- K6 - Grief and Loss
- K7 - Intimacy and Relationships
- K8 - Family Dynamics
- K9 - Communication Skills
- K10 - Dynamics of Addiction
- K11 - Clear Thinking
- K12 - Human Development
- K13 - Sexual Addiction
- K14 - Social Skills
- K15 - Self Esteem and Self Awareness
- K16 - Art and Anger
- K17 - Choices



Column 26 - Date of Last RIRB Treatment Plan

The date of each resident's most recent treatment plan by the Restrictive Integration Review Board/Pre-Release Review Board is listed.

- "x" following the date indicates that the resident did not attend the review.
  - "t" following the date indicates that the review included an annual review of treatment.
  - "c" following the date indicates that the review included a community access/Authorized Absence application.
  - "s" following the date indicates that the review was to make only a recommendation of SDP status for a Section 9 hearing.
-



Column 19 - Date of Parole and Transition Program Eligibility

- Each resident's parole eligibility and Transition Program eligibility status is listed.
- PE = indicates that a resident already is parole eligible on his criminal sentence.
- civil = indicates that a resident is committed to the Treatment Center only through a civil commitment. The parole process does not apply.
- A yyyy-mm-dd date = indicates the date on which a resident will be parole eligible on a criminal sentence.
- none = indicates that a resident is serving a first degree life sentence and will not be eligible for parole.
- wrap = indicates that a resident has completed prison sentence.
- TPE = indicates a resident is eligible for participation in the Treatment Center Transitional Program.
- PTC = indicates that a resident has been paroled from his governing prison sentence to the Treatment Center by the Parole Board. He also remains at the Treatment Center under his Ch123A SDP one-day-to-life civil commitment. He is eligible for participation in the Treatment Center Transitional Program.

Column 20 - Date of Completion of any Prison Sentence

- Each resident's status regarding completion of any criminal sentence is listed.
- A yyyy/mm/dd date = indicates the date on which a resident will complete any criminal sentence.
- A four digit year = indicates the year in which a resident completed any criminal sentence.
- civil = indicates that a resident is committed to the Treatment Center only through a civil commitment. No criminal sentence was applied.
- Life-2nd = indicates that a resident is serving a second degree life sentence and has no definite date of completion of the sentence.
- Life-1st = indicates that a resident is serving a first degree life sentence and has no date for completion of the sentence.



Column 24 - Treatment Coordinator

Each resident's Treatment Coordinator is listed.

Staff Initial Codes

Beckwith, Paul	- PB
Cusack, John	- JC
Diamond, Deborah	- DD
Dion, George	- GD
DiZio, Nancy	- ND
Duffy, Amanda	- AD
Eells, Susan	- SE
English, William	- WE
Graves, Pamela	- PM
Higgins, Lonna	- LH
Hulnick, Midg	- MH
Price, Stephen	- SP
Schwartz, Barbara	- BS
Sinn, Timothy	- TS
Weeden, James	- JW
Zella, William	- WZ

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ATTACHMENT 7







## **ANNUAL TREATMENT REVIEW**

**RESIDENT:** Sandy Jo Battista # M15930

**DATE OF BIRTH:** December 30<sup>th</sup>, 1961

**REVIEW DATE:** March 8<sup>th</sup>, 2005

**REPORT DATE:** March 14<sup>th</sup>, 2005

**DATE OF LAST REVIEW:** April 21<sup>st</sup>, 2004

**TREATMENT TEAM:** Brent Thibault, MA, LMHC  
Anne Boutin-Gammon, MA, LMHC  
Christina Orf, MA  
Henry Brady, MS

### **Identifying Information:**

Mr. Battista is a 43-year-old, single Caucasian male who was Temporarily Committed to the Massachusetts Treatment Center on May 24<sup>th</sup>, 2001. He was found to be a Sexually Dangerous Person on May 15<sup>th</sup>, 2003.

Mr. Battista's governing offense includes being charged and convicted for Rape of a Child by Force, for which he received a 12-20 year sentence, Unarmed Robbery for which he received a concurrent 12-20 year sentence, and a 9-10 year sentence for Kidnapping. These convictions stem from a December 5<sup>th</sup>, 1982 incident in which Mr. Battista kidnapped and raped a 10-year-old girl. Mr. Battista also had one prior conviction for Indecent Assault and Battery.

### **Circumstances of the Annual Treatment Review**

This Review is being conducted as a part of the treatment review process mandated by Massachusetts General Laws Chapter 123A. This report is being prepared for presentation to the Community Access Board (C.A.B.). In preparing this report, this resident's progress in treatment has been assessed through a review of his Admission and/or Intake Summary, all available official versions of documented sexual offenses, R.I.R.B./C.A.B. Reviews, Qualified Examiner reports, Section Nine decisions, previous



Annual Treatment Reviews, Achievement Matrices, Treatment Plans, Treatment Review Panel Reports, relevant psychological testing and group, class and treatment progress notes. Mr. Battista chose to participate in his Annual Treatment Review.

#### **Limits of Confidentiality Warning**

Mr. Battista was informed that the review meeting was not confidential, and that he could choose whether or not to answer any question(s) during the course of the meeting. Mr. Battista was further informed that a report would be submitted to the C.A.B. and that anything he said may be written in the report which would be placed in his record where it may be reviewed by the various boards at the Treatment Center, by a Qualified Examiner, or by any court. Mr. Battista indicated that he understood the above, and the Review proceeded on this basis. Mr. Battista indicated that he contacted his lawyer by telephone to receive guidance regarding whether or not to participate in his C.A.B. but they have not spoken as of yet. Mr. Battista indicated that he planned to attend his C.A.B. meeting.

#### **2004-2005 Community Access Board Goal Recommendations**

In referencing the Community Access Board Annual Review of April 21<sup>st</sup>, 2004, written by Frank DiCataldo, Ph.D., the following recommendations were made, in addition to the treatment teams' recommendations:

- Mr. Battista should continue to create his deviant cycle, clearly identifying all the existing deviant sexual desires at work in his governing offense and in his prior sexual offense.
- Mr. Battista should more directly address victim empathy issues and begin to move away from his victim stancing and replace it with the true victims of his offense and potential future victims.
- Mr. Battista should re-examine and talk more about his refusal to participate in the PPG.
- Mr. Battista should explore the relationship between his Gender Identity issues and his sexual offense risk.

#### **Review of Treatment/Progress**

##### **1. Primary Group Assignment, Percentage of Attendance and Participation Level:**

Mr. Battista was originally assigned to and attended the B-2-B Primary Group which was previously co-facilitated by Shawn Thomas, M.Ed, and Anne Boutin-Gammon, MA, LMHC, then Anne Boutin-Gammon, MA, LMHC and Christina Orf, MA. In July 2004 Mr. Battista was transferred to and attended the B-1-B Primary Group, which was previously co-facilitated by William English, MA, LMHC and Christina Orf, MA, and presently co-facilitated by Christina Orf, MA and Brent Thibault, MA, LMHC. In February 2005, Mr. Battista transferred to the C-2-A Primary Group co-



facilitated by Stephen Corrigan, MA, LMHC and Janna Douglas, MA. He currently has a 92% attendance rate. Mr. Battista is generally active in Primary Group and appears, at times, forthcoming about his thoughts and feelings. However, of concern is the fact that Mr. Battista requested and then subsequently moved to two different Primary Groups in one year. These requested moves on his part may indicate (1) a continued difficulty concerning receiving and/or accepting feedback from others and/or (2) "jealousy" if he had to work with two female therapists. It is apparent, that Mr. Battista should give strong consideration to exploring why he felt the need to switch Primary Groups twice in one year as it may be impacting his ability to fully engage in the treatment process.

**2. Psycho-educational Classes:**

Mr. Battista completed the following Psycho-educational classes during this review period: Cognitive Distortions II and Victim Empathy II.

Evaluation comments for Mr. Battista's completed psycho-educational classes were not available at the time this ATR was being written.

**3. Specialty Group:**

Mr. Battista did not participate in any specialty groups during this review period.

**4. Unit Community Meeting:**

Mr. Battista attends approximately 50% of the unit community meetings and chaired one unit meeting in November 2004.

**5. Other Therapeutic Activities:**

Mr. Battista reports that he presently speaks with the clinical staff in HSU on a monthly basis to discuss his gender identity related issues as he continues receiving medical treatment for gender reassignment.

**6. Progress on 2004-2005 Community Access Board Goal Recommendations:**

- Mr. Battista should continue to create his deviant cycle, clearly identifying all the existing deviant sexual desires at work in his governing offense and in his prior sexual offense.

**Status:** Mr. Battista finished presenting his deviant cycle in group, received feedback from the group, and then submitted the cycle to the Treatment Team with the incorporation of group feedback for staff review. The Treatment Team has a couple of concerns regarding Mr. Battista's presentation of his Deviant Cycle, which will be highlighted by excerpts from two progress notes. On 11/24/04, "...Mr. Battista presented as somewhat guarded in response to questions about his deviant cycle, as though he did not want to provide any more information than what he wrote down for the assignment." On 11/05/04, "...Mr. Battista appeared somewhat frustrated at times, when challenged by his peers and/or the therapists, but was able to express himself appropriately."



Presently, Mr. Battista's deviant cycle is under review by the Treatment Team and there are some concerns. First, Mr. Battista's LRS (Low Risk Situations) appear to contain maladaptive behaviors and thus warrant revision. Secondly, Mr. Battista has alluded to a belief that the written treatment work is simply comprised of exercises that people will do because they are required to do so in order to leave. Further, Mr. Battista does not appear to endorse the treatment related work as an avenue to make meaningful changes in his life leaving considerable question as to what his integration level is. The Treatment Team strongly recommends that Mr. Battista explore his concerns with the Treatment Team. It is the Treatment Team's hope that this will result in a reduction in any cognitive distortion that may impede Mr. Battista's ability for self-growth and treatment advancement.

- Mr. Battista should more directly address victim empathy issues and begin to move away from his victim stancing and replace it with the true victims of his offense and potential future victims.

**Status:** Mr. Battista enrolled in and passed Victim Empathy II. However, the class evaluation was not available at the time this report was written. In Primary Group dated 08/18/04, Mr. Battista stated, "...how his (Mr. Battista's) anger and frustration is interfering with his capacity to develop victim empathy. He expressed recognition that he has focused on his own pain and the harm he has experienced in life, which has impeded a full understanding of the impact his offense had on his victim. He stated that he enrolled in Anger Management, but quit because 'I got more angry and frustrated.' When asked why he thinks he presents as so angry and frustrated, Mr. Battista stated 'because I don't agree with this law and I will never accept this.' He further stated that he feels that the civil commitment process is based upon 'public outrage' and 'media hysteria.' He also expressed frustration at having to live life as a man stating that the institution 'forces me to cross-dress.' It was communicated to Mr. Battista that his anger and frustration may stem from a sense of loss of control. He was receptive to feedback from the group and stated, 'maybe I'm scared to get rid of anger because then I'll have to deal with underlying feelings.'

In terms of progress, Mr. Battista appears to have just scratched the surface concerning this recommendation and is encouraged to explore all of the intricate components in much greater detail in future Primary Groups.

- Mr. Battista should re-examine and talk more about his refusal to participate in the PPG.

**Status:** Mr. Battista remains adamant that he will not participate in the PPG, citing that it is humiliating and not appropriate for anyone to have to endure. The Treatment Team encourages Mr. Battista to fully explore his concerns about taking the PPG with his Treatment Team.



- Mr. Battista should explore the relationship between his Gender Identity issues and his sexual offense risk.  
**Status:** Mr. Battista has made references to his Gender Identity issues but has not directly correlated any type of relationship between his Gender Identity issues and his sexual offense risk since the beginning of 2004. The Treatment Team encourages Mr. Battista to continue to be open and honest about exploring the possibility of a connection in future Primary Groups.

**7. Review of Rehabilitation Progress:**

Please refer to attached Rehabilitation Report.

**8. Review of Health Issues:**

Mr. Battista stated that he would sign a release of information to allow his Treatment Team to have contact with HSU to discuss specific issues as they take place. However, at the time of this report, this information was not yet available.

**Summary of Progress in Major Areas of Clinical Focus/Treatment Plan:**

**1. Cognitive Restructuring**

**Status:** The Treatment Team recommended that Mr. Battista continue to openly and honestly discuss his own cognitive distortions and then begin to test their validity. In terms of progress, Mr. Battista appears rather open about his thoughts, including his distortions (such as blaming others, intellectualizing and justification). However, he continues to struggle with interrupting his distortions "in the moment" resulting in unnecessary and avoidable interpersonal conflicts with others.

**2. Identification of Sexual Assault Cycle**

**Status:** The Treatment Team recommended that Mr. Battista present his deviant cycle to his Primary Group and to his treatment team. As noted in earlier, Mr. Battista finished presenting his Deviant Cycle in group, received feedback from the group, and then submitted the cycle to the Treatment Team with the incorporation of group feedback for staff review. The Treatment Team has concerns regarding Mr. Battista's presentation of his Deviant Cycle, which is highlighted by excerpts from two progress notes. First, on 11/24/04, "...Mr. Battista presented as somewhat guarded in response to questions about his deviant cycle, as though he did not want to provide any more information than what he wrote down for the assignment." Secondly, on 11/05/04, "...Mr. Battista appeared somewhat frustrated at times, when challenged by his peers and/or the therapists, but was able to express himself appropriately." Presently, Mr. Battista's deviant cycle is under review by the Treatment Team and there is concern that Mr. Battista's LRS' (Low Risk Behaviors) appear to contain maladaptive behaviors and thus warrant revision. Presently, it appears as though Mr. Battista's Deviant Cycle has a good foundation but will likely require more in depth exploration and processing to make all of the necessary connections.



**3. Identification and Modification of Deviant Sexual Arousal**

**Status:** The Treatment Team recommended that Mr. Battista define arousal, undergo a Phallometric Assessment and participate in any treatment recommended, and discuss his current and past deviant sexual thoughts and fantasies. Mr. Battista continues to refuse to undergo a Phallometric Assessment and has not discussed any current or past deviant sexual thoughts and fantasies other than discussing information pertaining to his governing offense. It is the Treatment Team's recommendation that Mr. Battista further explore his deviant sexual arousal, as he appears to have only scratched the surface with regards to exploring this component of his treatment.

**4. Relapse Prevention**

**Status:** Mr. Battista has completed the coursework for Relapse Prevention I, II, and III. However, an oversight enabled him to take II and III without having his Deviant Cycle completed and signed off by staff. Subsequently, it is difficult to adequately address treatment-related issues in Relapse Prevention without having a thorough understanding of the deviancy involved. Mr. Battista is still working on identifying, acknowledging, and accepting all of his various levels of deviancy. Thus, the Treatment Team strongly recommends that he re-visit the concept of "Relapse Prevention" and everything that it entails as more in depth integration is necessary in light of the work he is doing related to deviancy.

**5. Accountability and Accepting Responsibility**

**Status:** The Treatment Team recommended that Mr. Battista admit to committing all aspects of his governing offense according to the police reports to his Primary Group and disclose more details than are noted in his police reports. During this review period, Mr. Battista referenced this recommendation in Primary Group on 11/12/04 which stated: "...Mr. Battista then raised a H&N issue regarding the Accountability and Accepting Responsibility section of his treatment plan. He stated that this section of his treatment plan asks him to admit to all sex offenses on his record, which he says he has done. It was communicated to him that unless this information is clearly documented in a group note, this goal would continue to be recommended. Mr. Battista then stated, 'I admit to all sex offenses on my record,' but provided no detailed description of each offense during today's session." In terms of the assessment section as well as the Treatment Team's present position on this matter, "Mr. Battista presented as somewhat sarcastic when discussing the recommendation that he admit to all sex offenses on his record. He appears to lack a complete understanding that what is expected of him for this recommendation includes more than a statement of guilt to his primary group." Subsequently, it is the Treatment Team's recommendation that Mr. Battista more fully explore this treatment recommendation.



#### **6. Drug and Alcohol Abuse Treatment**

**Status:** The Treatment Team recommended that Mr. Battista address how substances played a role in his life. Mr. Battista has not addressed this recommendation during this review period other than in Primary Group on 03/26/04 where he "...discussed his history of substance abuse and asked group members for their opinion regarding if he needs to explore his use in more depth, and if so how should he go about doing so." "...He asked what he should participate in regarding addressing his substance abuse history." "Mr. Battista received feedback that he should explore his substance abuse history in more depth as it appears to be significant. Group members reviewed the available treatment options that are offered regarding substance abuse, such as AA, a psycho-educational class, and a substance abuse specialty group." The assessment section indicated that "Mr. Battista appeared more receptive to his fellow group members when they suggested that his substance abuse history is significant, as compared to when the Treatment Team has made similar recommendations." Presently, the Treatment Team strongly encourages Mr. Battista to explore how substances played a role in his crime via any one or combination of therapeutic outlets provided to him at the Treatment Center to do so.

#### **7. Anger Management and Stress Management**

**Status:** The Treatment Team recommended that Mr. Battista discuss the role that anger and stress played in his life and during his sex offenses, and that he attend the Anger and Stress Management psycho-educational class. Mr. Battista has, from time to time, discussed the role he perceives anger to play. However, he has yet to enroll in the Anger and Stress Management psycho-educational class. During his Annual Treatment Review, Mr. Battista acknowledged that he, at times, is irritable and frustrated. He went on to state that it was, in part, due to the DOC having him live a life that was not him. He went on to state that he has dropped all of his lawsuits as well as his Section 9 petition. Mr. Battista stated that he enrolled in the Conflict Resolution psycho-educational class for next quarter. It is the Treatment Team's recommendation that he more fully explore this component of his treatment as he has yet to do so.

#### **8. Victim Empathy**

**Status:** The Treatment Team recommended that Mr. Battista discuss what victim empathy is and how it can be helpful in his treatment, and that he attend the Victim Empathy Psycho-educational class. As noted previously, Mr. Battista completed the Victim Empathy II psycho-educational class. He also continues to acknowledge that he needs to work on developing victim empathy.

#### **9. Understanding Human Sexuality**

**Status:** The Treatment Team recommended that Mr. Battista complete the Understanding Human Sexuality Psycho-educational class. Mr. Battista did not complete this recommendation over the past year.



**10. Social Skills Training**

**Status:** The Treatment Team recommended that Mr. Battista attend 90% of all Community Meetings and attends the Social Skills psycho-educational class. Mr. Battista's attendance at Community Meetings over the past year was approximately 50% and he has not enrolled in a Social Skills class as was recommended. In addition, since the last Annual Treatment Review, Mr. Battista has transferred Primary Groups twice and went from B Unit to the C Unit in February 2005 citing interpersonal conflicts with both residents and CO's. Since Mr. Battista has not addressed these goals over the past year in conjunction with his interpersonal difficulties, the Treatment Team will continue to recommend them.

**11. Adult Life Skills Training**

**Status:** The Treatment Team recommended that Mr. Battista maintain a job in the Institution. Mr. Battista maintained a job when he resided on the B Unit, but has not had a job since moving to the C Unit. Mr. Battista has been active in attaining a job since transitioning to the C Unit.

**12. Release Planning and Transition Into the Community**

**Status:** The Treatment Team has not recommended any goals in this area at this time.

**Disciplinary Action:**

Mr. Battista received no Observation of Behavior Reports during this review period.

**Recommended Treatment Plan Goals:**

Please refer to the attached Treatment Plan.

**Clinical Formulation:**

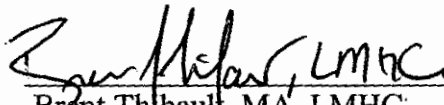
Mr. Battista is a 43-year-old, single Caucasian male who was Temporarily Committed to the Massachusetts Treatment Center on May 24<sup>th</sup>, 2001. He was found to be a Sexually Dangerous Person on May 15<sup>th</sup>, 2003.

Mr. Battista's governing offense includes being charged and convicted for Rape of a Child by Force, for which he received a 12-20 year sentence, Unarmed Robbery for which he received a concurrent 12-20 year sentence, and a 9-10 year sentence for Kidnapping. These convictions stem from a December 5<sup>th</sup>, 1982 incident in which Mr. Battista kidnapped and raped a 10-year-old girl. Mr. Battista also had one prior conviction for Indecent Assault and Battery.

Over the past year, some progress has been noted. Mr. Battista is generally active in Primary Group and appears to be forthcoming about his beliefs. Mr. Battista reports that he presently speaks with the clinical staff in HSU on a monthly basis to discuss his gender identity related issues as he continues receiving medical treatment for gender



reassignment. In February 2005, Mr. Battista transferred to the C Unit from the B Unit. The Treatment Team is concerned that he has requested and then moved Primary Groups twice and Units once in one year, citing interpersonal conflicts with both residents and CO's and not be able to work with two female therapists. This may indicate difficulty with receiving and/or accepting unpleasant feedback from others. Along with this, Mr. Battista has alluded to a belief that the written treatment work is simply comprised of exercises that people will do because they are required to do so in order to leave. Further, Mr. Battista does not appear to endorse the treatment related work as an avenue to make meaningful changes in his life, leaving considerable question as to what his true level of integration is. The Treatment Team strongly recommends that Mr. Battista explore his concerns with the Treatment Team and make a genuine effort to take risk in treatment in order to facilitate personal growth.



Brent Thibault, MA, LMHC

Report Writer/Treatment Unit Coordinator, B Unit

Attachments:

Rehabilitation Report  
Treatment Plan  
Achievement Matrix

xc: F.H.S. Clinical File  
C.A.B. Members  
F.H.S. Clinical Director  
D.O.C. Deputy Superintendent of Treatment/Classification  
Treatment Coordinator  
D.O.C. File  
Resident